JAMES H. McKENNEY

Supreme Court of the United States,

OCTOBER TERM, 1895.

No. ~~[illegible]~~ 366.

IN THE MATTER OF THE PETITION

OF

THE PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED, THE CLAIMANT OF THE STEAMSHIP "PLYMOTHIAN," FOR A WRIT OF CERTIORARI IN THE SUITS OF:

THE CANTON INSURANCE COMPANY, LIMITED, ET AL.,
Appellants,

against

CLAIMANTS OF THE STEAMSHIP "VICTORY" AND CLAIMANTS OF THE STEAMSHIP "PLYMOTHIAN,"
Appellees,

AND

CLAIMANTS OF THE STEAMSHIP "VICTORY,"
Appellants,

against

THE CANTON INSURANCE COMPANY, LIMITED, AND CLAIMANTS OF THE STEAMSHIP "PLYMOTHIAN,"
Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

WHITEHURST & HUGHES AND
CONVERS & KIRLIN,
Proctors for Petitioner.

Supreme Court of the United States,

October Term, 1895.

THE CANTON INSURANCE COMPANY, LIMITED, *et al.*,
Appellants,

VERSUS

Claimants of Steamship "VICTORY" and Claimants of Steamship "PLYMOTHIAN,"
Appellees,

AND

Claimants of Steamship "VICTORY,"
Appellants,

VERSUS

THE CANTON INSURANCE COMPANY, LIMITED, and Claimants of Steamship "PLYMOTHIAN,"
Appellees.

In the Matter of the Petition of the Port of Plymouth Steamship Company, Limited, for a writ of certiorari.

TO THE HONORABLE THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of the Port of Plymouth Steamship Company, Limited, claimant of the steamship *Plymothian*, in the above entitled causes, respectfully shows unto the Court as follows:

1. On the afternoon of Thursday, November 12, 1891, a collision occurred on the eastern edge of the main ship channel of the Elizabeth River, about half a mile below Lambert's Point, between the British steamship *Victory*, bound up the river to the port of Norfolk, Va., light, for cargo, and the British steamship *Plymothian*, which, bound on a voyage from Galveston, Texas, to Liverpool, with a cargo of 3,682 bales of cotton, had that morning put into Lambert's Point for bunker coal, and was proceeding to sea. In the collision aforesaid the steamship *Victory* was injured to some extent forward, and the steamship *Plymothian*, struck by the bow of the *Victory* on her port side, was so seriously injured that she, in the course of a few moments, with her said cargo, sunk in shoal water on the eastern side of the said Elizabeth River.

2. On November 14, 1891, a libel was filed by S. Elcoate, master of the steamship *Victory*, against the said *Plymothian*, in the District Court of the United States for the Eastern District of Virginia, for damages sustained by the *Victory* in said collision; on November 27, 1891, a libel was filed by the Canton Insurance Company, Limted, *et als.*, owners and underwriters of the cargo of cotton on board the *Plymothian*, and damaged to the extent of $73,000, against both steamships. Answers to these libels were duly filed. On December 3, 1891, the owners of the steamship *Victory* filed their petition for limited liability; and on the same day your petitioner, claimant of the steamship *Plymothian*, filed its petition for limited liability. The preceding libels were then merged in these two limited liability proceedings; answers were duly filed thereafter by the proper parties, and the causes proceeded to hearing. It was ascertained by the Commissioner to whom the matter of damages was referred, that, in the collision aforesaid, the steamship *Plymothian* was injured to the extent of $41,684.12; the cargo of cotton to the extent of $73,320.88; and the steamship *Victory* to the extent of $14,363.80, all of said sums bearing interest from December 1, 1891.

The steamships in said proceedings were duly appraised

and bonded, the *Victory* in the sum of $67,500 and the *Plymothian* and her earned freight (less agreed salvage) at $40,221. The above causes were heard by the District Judge in June, 1894, and in September, 1894, were decided by him, he holding the steamship *Plymothian* without fault in the said collision and the steamship *Victory* solely at fault. On the 30th of October, 1894, the District Court entered its decree in these causes to the above effect, giving a judgment against the bond of the *Victory* in favor of the petitioner for $24,478.78, and of the cargo owners in the aggregate for $41,882.74, and interest from October 30, 1894, being their respective *pro rata* recoveries on the *Victory's* bond of $67,500.

3. From this decision both the cargo owners and the claimants of the *Victory* appealed to the U. S. Circuit Court of Appeals for the 4th Circuit and that Court heard argument in these causes in February, 1895, and on the 28th day of May, 1895, filed its decision affirming the District Judge in his finding as to the fault of the *Victory*, but modifying the decree in respect to the *Plymothian*, holding that she had not adopted the necessary precautions for avoiding the collision, and decreeing full recovery to the owners of her cargo, first, against the bond of the *Victory* to its entire amount, and then over against the bond of the *Plymothian* for the remaining amount due them on their entire loss. The opinions of the District Court and the Circuit Court of Appeals appear in the record filed herewith at folios 447–458 and 498–504 respectively, and are also appended as a part of this petition. Rehearings were asked and denied, but the mandate was suspended until November 1, 1895, to give opportunity to make this application.

4. As a result of this *modification* your petitioner is denied its judgment on the *Victory's* bond of $24,478.78, with interest from October 30, 1894, as decreed by the District Court, and, in addition, is now called upon to pay on its bond to the cargo owners a deficiency of some $20,000, aggregating a total difference of some $46,000 to the *Plymothian*.

5. Upon the trial the following facts appeared and were in substance so found in both courts: The two steamships came into collision at 4.14 P. M. on November 12, 1891, on a clear afternoon, close upon black buoy No. 7, which marks the eastern edge of the 18-foot channel of the Elizabeth River, between Lambert's Point and Craney Island Lighthouse. The charts filed in these causes, the originals of which are before the Court, show the following courses and distances. From Lambert's Point Lighthouse to buoy 9 is 350 yards N. W. by W.; from buoy 9 to buoy 7, the place of collision, 735 yards due north; from buoy 7 to Craney Island Lighthouse 1,200 yards N. ½ E.; width of channel at buoy 9, 450 yards; at buoy 7, 475 yards; at Craney Island, 350 yards. The range of mid-channel, from a point opposite Craney Island Lighthouse to a point opposite buoy 9, is N. ½ E.; the distance about 1⅛ miles. A rough diagram of the channel, &c., is appended.

The steamship *Victory*, Elcoate, master, with a crew all told of 31 men, was an iron ship of 1,774 net tonnage, 338 feet long, 38½ beam, 17 feet aft, 13 feet forward, of draught, and was bound up the river to Norfolk, light, with 400 tons of water ballast and 550 tons of coal.

The *Plymothian*, Mardon, master, with a crew, all told, of 21 men, was an iron ship of 1,016 net tonnage, 260 feet long, 16 feet draft, with a cargo of 3,682 bales of cotton, and was proceeding down the river from Lambert's Point, bound to sea.

Each steamship had its captain on the bridge with a Virginia pilot in charge of navigation. Just as the *Plymothian*, having left Lambert's Point pier, had rounded buoy 9, and had straightened out on her course down the eastern side of the channel, the *Victory*, in coming up from Hampton Roads, was just abreast of Craney Island Lighthouse. This was at 4 P. M.; the vessels were then 1⅛ miles apart, the *Victory*, which had been moving 10 miles an hour, is then alleged to have slackened her speed to some 6 or 7 miles an hour, and the *Plymothian* was moving about 4 miles an hour. The tide was flood, running about 2 miles an hour. The *Plymothian* kept well to the eastern side of the channel on a ported helm.

The weight of evidence shows the *Victory* off Craney Island about mid-channel, though her navigators claimed her to be on the eastern side, while several of the disinterested witnesses place her close over to the western edge of the channel. Upon rounding buoy 9 and straightening out on her course down the eastern side of the channel, the *Plymothian* gave a long whistle, indicating that she would pass the *Victory* port to port. It was some time before the *Victory* answered, which she at length did with a cross-signal of two whistles; this not until, by a heavy preponderance of testimony, and as admitted by her pilot, Nelson (Record, pp. 331, 340), she was half way between Craney Island and buoy No. 7. The *Plymothian* thereupon blew one signal whistle a second time, and was then promptly answered by a cross-signal of two whistles from the *Victory*, the *Victory* having in the meantime directed her course from mid-channel to the eastern side, and the *Plymothian* being headed down the river close to the eastern edge of the channel.

The steamer *Plymothian* thereupon blew alarm signals and at once backed her engines full speed, continuing the same until the collision. The heavy preponderance of testimony shows, as found by the District Judge, that at the collision, which occurred shortly thereafter, the headway of the *Plymothian* was entirely overcome, and it is possible that she attained a slight backward movement. The *Victory* also blew alarm whistles and reversed her engines, but the headway of the *Victory* was not overcome and she ran into the *Plymothian*, striking her port side with such force as to drive 15 inches into her port side and to render immediate beaching necessary.

At the time of the collision the *Plymothian's* bow was touching buoy No. 7, on the eastern edge of the channel, and in another moment she would, under her port helm, have grounded. The angle of collision was about 60 degrees.

6. The evidence of the masters and crews of the steamships, and four witnesses for the *Victory*, were taken by deposition. The evidence of the licensed pilots of both vessels and 17 of the 21 disinterested witnesses, many of

whom he knew personally, were taken in open Court before the District Judge who has presided in that district for 21 years, and is, of course, thoroughly conversant with the waters in which the collision occurred. Much conflict of testimony was developed on many of the numerous questions at issue.

7. The main allegations of the *Victory's* navigators, as shown by her pleadings, were:

(*a.*) That the *Plymothian* had defective whistles.

(*b.*) That on coming out from Lambert's Point pier, she crosssed over to the western side of the ship channel, and then recrossed to the eastern side when the collision occurred.

(*c.*) That she failed to stop and reverse when danger of collision arose.

(*d.*) That the *Victory* herself was on the eastern side of the channel, and was prevented from taking the western side by several steamers and schooners which were in the river.

On all of these charges the District Judge found strongly against her, a finding which was seemingly followed by the Circuit Court of Appeals, save probably as to the third charge.

The allegations of the *Plymothian* against the *Victory* were:

(*a.*) That the *Victory* was in mid-channel at Craney Island, and failed to keep in mid-channel or on the western side, as the rules of navigation directed.

(*b.*) That she failed to answer the first signal of the *Plymothian* of one blast, for some time, and then replied by a cross-signal.

(*c.*) That she then starboarded her helm and came over to the eastern edge of the channel, down which the

Plymothian was proceeding, thereby causing the collision.

(*d.*) That she was moving at too rapid a rate of speed, and failed to stop and reverse as the law prescribed.

All of which charges were fully sustained by a large preponderance of evidence, and by the findings of both the District Court and the Circuit Court of Appeals, the latter holding her faults so gross as to be almost willful.

8. It does not clearly appear from the decision of the Circuit Court of Appeals wherein it found the fault of the *Plymothian* to consist.

She is found guilty "of an act of omission" merely, and even that is not specified. The District Court found the *Victory* solely at fault; the Circuit Court of Appeals concurred, holding the *Victory* so grossly in fault as to seem almost willful (Record, 503). The District Court held the *Plymothian* to have done everything she should have done; she left her pier and proceeded down the river on the proper course (*i. e.*, the starboard side); at a proper rate of speed; sounding a lawful signal; and the proper one; and the first one; repeating it; and as soon as a change of course on the part of the *Victory* was discovered, at once sounding her danger signals; stopping and reversing her engines; and becoming, by the time the collision occurred, a stationary, if not a receding, object; on the extreme edge of her proper side of the river, where in another moment she would have grounded, and there she was violently struck by a vessel which had grossly violated the rules of navigation. The Circuit Court of Appeals seem, by their decision, to have concurred in these findings as to her course, her speed, her signal, everything, indeed, save presumably in not stopping and reversing earlier. If such be the proper construction of their decision, so far from their having a clear preponderance of testimony to sustain them, the great weight is against their finding that the *Plymothian* should have stopped earlier. The District Judge held that not only did the *Plymothian* stop and reverse the

moment that the obligation was upon her, but so effectually that at the collision her headway was entirely overcome, with a possibility of her having obtained a slightly backward movement.

Not a single one of the numerous disinterested witnesses examined on behalf of the *Victory* venture to speak of the *Plymothian's* speed at the collision. Their silence on this all-important fact is strangely significant. Of course the six witnesses examined from the crew of the *Victory* state that the *Plymothian* failed to reverse, but an examination of their testimony discovers it to be so self-contradictory and exaggerated as to be of little weight. The witnesses from the *Plymothian* and the record evidence show conclusively that her engines were reversed four minutes before the collision, and that at the collision her headway was entirely checked, some stating that she was possibly making sternway.

See Engineer's Log, *Plymothian* (R., p. 282); Scullard (R., pp. 166–168); Cronquist (R., p. 174); Pearse (R., p. 179); Lyons (R., p. 211); Baird (R., p. 232); Wood (R., pp. 239 240); Schroder (R., p. 203); Lyons (R., p. 211); Ham (R., pp. 185–186–193); Mardon (R., pp. 265–266); Pilot Henley (R., p. 362).

This much more than outweighs the testimony of the *Victory's* crew; but to render it conclusive the following eye-witnesses, viewing the colliding vessels from different points, entirely corroborate the statements of the *Plymothian's* crew.

Etheridge (R., p. 355); Goodwin (R., pp. 374–375); Clark (R., p. 388); and Wynne (R., p. 405); all of them licensed tugboat men, whose daily life is led in these waters, and whose integrity, accuracy and skill cannot be questioned. The finding of the District Judge is justified, indeed demanded, by the testimony on this point, and its reversal on appeal cannot be sustained in law or in fact.

9. The modification made by the Circuit Court of Appeals in the decision of the District Court seems to have been based chiefly upon a difference of opinion upon a question of law as to when the duty attached to the *Plymothian* to stop and go astern, and in part upon a

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question of fact as to when the risk of collision became involved.

The District Judge apparently rested his decision exonerating the *Plymothian* for failure to stop and back at an earlier moment, upon the ground that risk of collision did not become involved by the mere blowing of whistles, at a time when the vessels were above three-fifths of a mile apart and there was plenty of room to repent and do right even after whistling wrong, but only became involved when the *Victory*, pursuant to her wrongful cross signal, changed her course from one that would have carried her clear of the *Plymothian* along the westerly side of mid-channel, to a course towards or crossing that of the *Plymothian* on the easterly side; and that then and immediately the engines of the *Plymothian* were stopped and reversed with the effect of entirely overcoming her headway and possibly putting her under some sternway, before the wrongful maneuvers of the *Victory* brought her into the *Plymothian's* port side.

The Circuit Court of Appeals apparently takes the view (which certainly cannot be said to be sanctioned by such a preponderance of evidence as a Court of Appeals ought to find to warrant it in disturbing a finding of fact made by a District Judge, who had seen the witness), that the vessels "were surely approaching each other" [so as to involve risk of collision], and that after they began so to approach "each doggedly kept her course, without taking any precaution whatever until too late, and when the pending collision became inevitable."

The passage referred to in the opinion of the Circuit Court of Appeals is as follows:

"The *Plymothian*, it is true, was on that side of the river where she should be, and the *Victory* was on the wrong side of the channel; yet, although the steamers were surely approaching each other, it was manifest that each doggedly kept her course without taking any precaution whatever until too late, and when the pending collision became inevitable. The slightest change in the course of each or of either of them would have prevented the collision."

It is submitted with great confidence that that finding not only is not supported by such a preponderance of proof as should warrant an appellate court in reversing a finding of fact in the District Court, but that the preponderance is distinctly the other way on the record. The line of the centre of the channel runs North ½ East. When the *Plymothian* was close to buoy 9, near the easterly edge of the channel, the *Victory* was about mid channel and opposite Craney Island Light. It is evident, therefore, that if both vessels had maintained those courses no collision would have resulted. It is not denied that the *Plymothian* never left the easterly edge of the channel, but maintained a steady course along that side. The *Victory* does not claim to have changed her course until about half way between Craney Island Light and Buoy 7, the place of the collision. Up to that time, therefore, the vessels were not approaching each other so as to involve risk of collision, and no duty so far attached to the *Plymothian*, which was proceeding at a very slow speed, to check down or stop. The very great preponderance of evidence shows that as soon as the *Victory* began to change the *Plymothian* stopped and backed and overcame her headway, if indeed she did not attain sternway. She did not proceed on her course for an instant after the *Victory* changed her course from one of safety to one of peril. It is confidently submitted, therefore, that the finding of the Circuit Court of Appeals, "that each doggedly kept her course without taking any precaution whatever until too late, and when the pending collision became inevitable" was not justified as a finding of wrongful navigation on the part of the *Plymothian*, and was a departure from that safe and salutary rule which forbids a Court of Appeals, upon conflicting evidence taken before a District Judge familiar with the waters and circumstances, to reverse the finding of the lower court as to an essential question of fact.

10. The omission of the *Plymothian* to reverse earlier, if a fault at all, is not shown to have contributed to the collision.

The Circuit Court of Appeals expressly held that the

Plymothian was on the starboard side of the channel, her proper side, when the first signals were sounded, and so continued until the collision. The *Victory* gave no signs of starboarding her helm and keeping to the East until after her first signals were blown, admittedly not until she was at least half way between Craney Island and buoy 7 (Nelson, R., pp. 331–340). The *Plymothian* was therefore at least halfway between buoy 9 and buoy 7, and only 300 yards from the point where the collision occurred, when the chances of collision could have for the first time become involved. She is now charged with failing to take legal precautions; that the slightest change of course would have prevented the collision. It is respectfully submitted that she took every precaution possible to her in that situation. She could not in any event have starboarded her helm and attempted to go to the westward. Such a course would have violated every rule of navigation, and undoubtedly brought on a head-to-head collision, with results disastrous to both vessels, and for which, under the law, she would have been clearly responsible. She could not port her helm more and go farther to the eastward than she did, for at the collision she was on the point of grounding on the eastern edge of the channel. She had reached her limit on that side. In a narrow channelway only 450 yards wide and narrowing, even the slightest change of course is not always open (as intimated by the appellate Court in its opinion), to a large ocean-going steamship nearly 300 feet long with heavy cargo. Nor would "the slightest change of course" on the part of the *Plymothian* have relieved the situation. She had been navigated, as she ought to have been, on the theory that the *Victory* would pursue her proper course (*i. e.*, to the middle or western side of the channel). The first moment she could have perceived that the *Victory* was disregarding her plain duty was when the *Victory* was half way between Craney Island and buoy 7, and she herself only some 300 yards from the point of collision, and at that time she reversed. She is held in fault for omitting to take precautions. What precautions? Forbidden by every rule known to maritime law to starboard her helm;

hemmed in by the shore on the east, she could only stop and reverse; and this she did, so effectually, and so promptly, as to become at the collision a stationary, if not a receding object to the approaching steamer.

What more do the principles of the admiralty law exact, what more has any decided case ever demanded, of a vessel? She was in effect at anchor, if not receding, when violently struck by the steamship *Victory*, whose obstinate and almost willful course had brought on the catastrophe. If she could or should have reversed a moment earlier, as the Court of Appeals says was her duty, in what respect would the situation have been improved? The only effect would have been to place her a few feet further south of buoy 7, where the *Victory* would doubtless have struck her with practically the same if not worse effect.

What precautions, to avoid collision, therefore, could she have taken that she did not take, and in what respect could such failure have contributed to the collision? No precautions were omitted. At most they were only delayed. Her fault, if any, is not therefore a statutory fault which imposes upon her the burden of showing it could not have contributed to the collision, but is only, on the finding of the Court of Appeals, a slight species of negligence in navigation—*i. e.*, in judgment as to when risk first became involved.

The decision of the Circuit Court of Appeals does not state that this omission or error of judgment contributed to the collision; it merely holds that "the disaster might have been prevented."

This is not sufficient as matter of law. The *Victory*, having violated the rules of the road in taking her course to the East, disregarding our proper signal to pass port to port, and replying with a cross signal, assumed the risks of navigation, and the *Plymothian* having stopped at the approach of risk and being stationary or backing at the collision, and thus having obeyed the statute, the burden is on *Victory* to show that mere delay on the part of the *Plymothian* in obeying the statute, not only *might*, but *must* have contributed to the collision. This burden of proof she has signally failed to carry, as an inspection of the record will demonstrate. A careful reading of the

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testimony of the pilot of the *Victory*, Nelson (R., pp. 329-346), will disclose his obstinacy and utter disregard of the rules of navigation and demonstrate the impracticability of the *Plymothian* doing anything to avoid the consequences of such reckless negligence.

11. The cargo owners have no equitable standing to demand complete indemnity.

The opinion of the Circuit Court of Appeals discloses that the Judges evidently arrived at the conclusion they did in respect to the *Plymothian*, from a desire to give full recovery to the cargo owners, who were regarded as innocent sufferers, in no way sharing in the faults committed.

While it is true that the cargo owners did not participate in any faults, if any such were committed on the part of the *Plymothian*, yet they stand before the Court as having, for a valuable consideration, entered into a deliberate contract, whereby the steamship should not be held responsible to them for any loss or damage from collision, "even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners or the other servants of the shipowner." Although some of the inferior Courts have, with the strong arm, set aside these provisions in a bill of lading relating to neglect of the ship's crew, as being against public policy, it is at least a matter of consideration, when the decision of the District Court on a question of fact, with conflicting testimony, is set aside by the upper Court from a desire to decree complete indemnity to innocent sufferers, that these same parties have deliberately entered into a contract with the shipowner that he should not be responsible to them for damages arising from the fault of his servants at a time when he could not control them, or of a pilot forced upon him by the law. No equity can be raised in their favor in such circumstances, and surely it cannot be that the stern demands of a great public policy require the Court to set aside a contract relieving the shipowner from liability for the fault of a compulsory pilot whom he cannot select or control.

12. The steamship *Plymothian*, if at fault in the collision, is freed from responsibility to her cargo owners by the express provisions of her bills of lading.

It will appear (by stipulation and exhibits, R., pp. 483–498) that every bill of lading issued by the master of the *Plymothian* for the cotton constituting this cargo, and injured as a result of this collision, contained two clauses, familiarly known as the "negligence" clause and the "flag" clause.

The "Negligence" clause reads as follows:

"That the vessel shall not be liable for loss or damage oc-
" casioned * * * by collisions, stranding or other accidents
" of navigation of whatsoever kind (even when occasioned
" by the negligence, default or error in judgment of the
" pilot, master, mariners or other servants of the ship-
" owner) * * *" (R., 487–489–490).

It must be conceded that if fault was committed on the part of the *Plymothian*, it arose from the negligence, default or error in judgment of the *Virginia* pilot, who was in charge of navigation, and was thus clearly within the foregoing exemption, if permitted to stand. Negligence, if any, on the part of her officers is equally within the exemption.

The "Flag" clause is as follows:

"This contract shall be governed by the law of the flag
" of the vessel carrying the goods, except that general
" average shall be adjusted according to York-Antwerp
" Rules, 1890. In accepting this bill of lading, the shipper,
" owner and consignee of the goods and the holder of the
" bill of lading agrees to be bound by all its stipulations,
" exceptions and conditions, whether written or printed,
" as fully as if they were all signed by such shipper,
" owner, consignee or holder, any custom of the port not-
" withstanding" (R., 488–492).

By stipulation it is an agreed fact that the steamship *Plymothian* is, and was at the time of the shipment of said cargo, and subsequently of the collision, a British vessel, and sailing under the British flag (R., 484).

By stipulation it is further agreed that the law of Great Britain, in respect to the validity of the foregoing provisions and exemptions, appears in the printed reports of the opinions of the courts of that country, and that reference may be had in the brief and upon the arguments of counsel to such printed reports, as proofs in this case of the law of Great Britain in respect to such provisions and exemptions, with the same force and effect as though the same had been formally proved and printed in the records (R., 484).

It cannot be, and has not been in the courts below contended by the learned counsel for the cargo owners, that the British law does not sustain these exemptive clauses. Their courts uniformly uphold their validity.

See as proof of the British law under the above stipulation: The *Duero*, L. R., 2 Adm. & Eccl., 398; Taubmann *vs.* Pac. Steam Nav. Co., 26 L. T. N. S., 704; Steel *vs.* State Line S. S. Co., L. R., 3 App. Cas., 72; Manchester S. & L. R. Co. *vs.* Brown, L. R., 3 App. Cas., 703; Grill *vs.* General Iron Screw Collier Co., L. R., 1 C. P., 600; The *Cressington*, L. R., 1 Prob., 152.

It is well known, and the foregoing cases fully prove, that negligence clauses are valid and binding under the British law.

The question now is, will American courts, in a case where British insurance companies (R., 4–5), are seeking to recover of a British vessel for the loss on goods shipped under bills of lading expressly freeing the vessel from such responsibility, and further providing that the laws of England shall govern the contract, set aside the deliberate contracts of the parties on the general grounds of public policy, and refuse to apply the Law they have selected as that under which their contract should be expounded.

This important question, of consuming interest to the whole commercial world, has been passed by in the decision of the Circuit Court of Appeals and a great liability placed on your petitioner, without one expression or comment on the part of the Court.

This question is one of great importance in Private International Law, and it has not yet been expressly answered in the Supreme Court; but in Liverpool Co. *v.*

Phenix Ins. Co., 129 U. S., 397, at page 458, the Court appears to have intimated that in a case like the present the contract should be upheld.

13. It is believed that the consequences of the "modification" of the lower court's decree by the Circuit Court of Appeals are very much larger than were contemplated by the Court when rendering the decision. The opinion says (p. 503):

"The *Plymothian* was guilty of an act of omission. *The course of the Victory seems almost willful.* The *Victory* no doubt was the chief cause of the disaster. If the *Plymothian* had taken the precautions which she should have taken, the disaster might have been prevented. Under these circumstances, *it would seem to be manifestly inequitable to assess upon her one-half* of the entire loss."

It further says (p. 504):

"If the spirit of the rule be adopted, and the liability of each vessel be measured by its degree of fault, exact justice will be done by applying the stipulated value of the *Victory* [$67,500] to the loss sustained by the cargo, and by requiring the *Plymothian* to make up any deficiency [the cargo damage was $71,000], so that the cargo owners obtain complete indemnity."

Inferentially, the Court only intended to impose upon the *Plymothian* this deficiency of $3,500, with, perhaps, a slight addition for costs.

In the District Court the *Plymothian* had been permitted to recover her own damages *pari passu* with the cargo damages against the bond of the *Victory*. *Plymothian's* damages amounted to $41,684.12, with interest from December 1, 1891. Permitting the cargo owners to take the whole of the *Victory's bond*, necessarily excluded the *Plymothian* from *pro rating* her own damages, as she had in the District Court, whereby she lost $41,684.12 and interest, and as the Court of Appeals, in its final decree (Record, 514), has allowed the cargo interest, the result is that the *Plymothian* will have to make up a deficiency of $20,000 instead of $3,500 to the cargo. Instead, therefore, of having only to make up a supposed deficiency of $3,500, as a careful reading of the opinion of the Court of Appeals

would indicate she was adjudged to do, the modification of the decree of the District Court in fact means a loss to the *Plymothian* of about $70,000, or within about $10,000 of the amount she would lose on an equal division of damages.

Another effect of this decision was to cast the entire burden of the costs of this heavy and expensive litigation in both lower Courts upon the petitioner, a result most extraordinary and inequitable.

11. Your petitioner avers that questions of gravity and importance are involved sufficient to justify the exercise of the extraordinary jurisdiction vested in this Court to issue a writ of *certiorari*, requiring the cause to be brought to this Court for its consideration and decision. The whole of the damages, with accrued interest, amounts to approximately $160,000.

A foreign vessel traversing a channel leading from the port of Norfolk, navigated, as your petitioner believes, in strict accordance with the rules of navigation, has been adjudged to pay a large sum of money upon the finding of a slight omission, which, in the opinion of the Court, it would be "manifestly inequitable" to adjudge to be such a fault as has heretofore, in the Federal jurisprudence, been deemed essential for fixing upon her any portion of collision damages, and moreover, has been denied the benefit of an exemption in her bills of lading, relieving her from the fault of a pilot, whom the master was by law bound to employ, and whom he could not control, and from the error of judgment or neglect of his servants in navigating the ship. Notwithstanding the bills of lading were freely and voluntarily made and delivered, and that it was therein expressly stipulated that all questions arising under the contract were to be adjudged and decided under English law, the benefit of the said exemptions construed by English law was not only denied to the petitioner, but the Court apparently, as may be inferred from the opinion, gave them no adequate consideration.

Further important questions in the cause brought up upon the petition filed by the *Victory*, relate to an unequal division of damages in cases of maritime torts, and to

the application of the International Regulations in such channels as the Elizabeth River, where this collision occurred. The first of these has a bearing upon the rights of this petitioner, in that should the Supreme Court be of the same opinion as the Court of Appeals, that it would be "manifestly inequitable" to apportion the damages equally, and should reach the conclusion that an unequal division is not sanctioned by our jurisprudence, it would annul that portion of the decree, and would restore the decision of the District Court, which wholly exonerated the *Plymothian*.

No damages can result to any of the parties in interest by reason of the allowence of a writ, as the bond of the *Plymothian* is more than double the amount decreed to the cargo owners, and bears sureties approved by their counsel.

15. Your petitioner presents herewith a certified copy of the transcript of record returned from the District Court to the United States Circuit Court of Appeals, and of the record in the last named Court.

Wherefore, your petitioner prays that this Honorable Court will, on or before the 1st day of November, 1895, to which time the mandate of the Circuit Court of Appeals has been suspended, cause the writ of *certiorari* to be issued, pursuant to the power vested in this Court by an act of Congress, entitled "An Act to establish Circuit "Courts of Appeal, and to define and regulate in "certain cases the jurisdiction of the Courts of the "United States, and for other purposes," approved March 3, 1891, requiring the said United States Circuit Court of Appeals for the Fourth Circuit to certify the whole record and causes to this Court for consideration, and that thereupon this Honorable Court will decide the whole matter in controversy in the same manner as if the causes had been brought to this Court for review by appeal.

And your petitioner will ever pray, &c.

THE PORT OF PLYMOUTH STEAMSHIP CO., LIMITED.
By
WHITEHURST & HUGHES and
CONVERS & KIRLIN,
Its Proctors.

4085

STATE OF VIRGINIA, }
County of Washington, } ss.:

FLOYD HUGHES, being duly sworn, makes oath that he is one of the proctors for the petitioner herein, and as such has had personal charge for said petitioner of the case in the foregoing petition mentioned in the District Court of the United States in the Eastern District of Virginia and in the Circuit Court of Appeals for the Fourth Circuit; that he has read the foregoing petition and the same is true to the best of his knowledge and belief. He further says that the petitioner is a foreign corporation, organized and existing under the laws of Great Britain, and that this petition is made and presented by due authority, and that the foregoing application is meritorious and not made for the purpose of delay.

FLOYD HUGHES.

Sworn to and subscribed before me this 23d day of September, 1895.

[SEAL.]

J. C. FOWLER,
U. S. Comr. for W. D. V. A.

I hereby certify that I have examined the foregoing petition, and that in my opinion the petition is well founded, and the case is one in which the prayer should be granted by this Honorable Court.

J. PARKER KIRLIN,
Of Counsel.

Opinion of the District Court.

U. S. DISTRICT COURT AT NORFOLK.

September 1, 1894.

In the Matter of S. ELCOATE, Master of the Steamship "VICTORY"

vs.

The Steamship "PLYMOTHIAN."

In the Matter of the OWNERS of the "PLYMOTHIAN'S" Cargo

vs.

The Steamers "VICTORY" and "PLYMOTHIAN."

IN THE MATTER

OF

The Petition of the "VICTORY'S" OWNERS for a Limitation of Liability.

IN THE MATTER

OF

The Petition of the "PLYMOTHIAN'S" OWNERS for a Limitation of Liability.

IN ADMIRALTY.

Statement.

On the 12th day of November, 1891, the steamers *Victory* and *Plymothian* came in collision in the Elizabeth River, between Lambert's Point and Craney Island Light. It was in broad daylight, at 4.14 P. M. of a clear day.

At the time of collision the *Victory* was bound in ballast from Hampton Roads to Norfolk. The *Plymothian* was bound to sea; having left Galveston November first, with a cargo of cotton, bound to Liverpool; and having, in the prosecution of that voyage, come in through Hampton Roads and taken coals at Lambert's Point, Norfolk.

By the collision, the portside of the *Plymothian* was cut below the water's edge near amidships, and to save her from sinking she was run ashore. Some of her compartments filled with water and her cargo was much damaged.

Several suits were brought by persons sustaining damage, and thereupon the owners of each steamer instituted proceedings for limitation of liability. The value of the *Victory* has been appraised at $67,500, and her owners have given stipulation for that amount.

The value of the *Plymothian* has been appraised at $33,350, and the value of her freight at $11,871, making a total of $45,221, which is to be reduced, however, by the steamer's proportion of the expenses incurred for salvage services to her and her cargo. The amount of her owner's liability will therefore be about $40,000.

In response to citations issuing in these proceedings, the damages arising out of said collision have been assessed. Those sustained by the owners of the *Victory* have been assessed at about $14,500. Those sustained by the owners of the *Plymothian* have been assessed at about $42,000; and the damages sustained by the owners of the *Plymothian's* cargo have been assessed at about $72,000.

In stating what I conceive to be the facts of this case, derived from a huge mass of conflicting testimony, I shall be in frequent conflict with evidence given on one side or the other in the case. Owing to the unusual volume of this evidence, it will be impracticable for us to analyze the statements of witnesses as to each fact, and to show why any fact which I have stated has been adopted. The task would be great and its execution tedious, and it has been rendered unnecessary by the usually elaborate and able discussions of the evidence which have been submitted by counsel on either side in their briefs.

The *Victory*, Elcoate, master, was an iron ship of 1,774 net tonnage, 338 feet in length, 38½ in breadth, with 17 feet aft and 13 feet forward of draft. She had on 400 tons of water ballast and 550 tons of coal. Her number of officers and crew was 31.

The *Plymothian*, Mardon, master, was 260 feet long, 1,016 tonnage net; had a crew all told of 21 men, and had a cargo of 3,682 bales of cotton. She responded with exceptional facility and promptness to her helm.

The two vessels were actually navigated by their respective pilots, Nelson on the *Victory* and Henley on the *Plymothian*. The masters of the two vessels were each on the bridge with the pilot, each acting as lookout, and seeing that the orders of the respective pilots were executed. Neither ship had a special lookout forward of the bridge in her bows. Several members of each crew were examined as witnesses in the case. All were respectively offered and ready to be examined.

The collision occurred close upon what is now black buoy 7, which marked the eastern side of the 18 foot channel between Craney Island Light and Lambert's Point Light, in Elizabeth River. The course of the channel up the river from Craney Island Light to black buoy 9 is

nearly south; and the channel at buoy 9 turns southeastward towards Norfolk, at an angle of about 65°. But the course coming out from the coal pier at Lambert's Point into the channel, around buoy 9, turns an angle of about 45°. According to a chart of this channel (Exhibit X.) filed by counsel for the *Victory*, the distance from Craney Island Light to buoy 7 is 1,200 yards, or about $\frac{2}{3}$ of a mile, and to buoy 9 is 1,967 yards, or $1\frac{1}{8}$ miles, the distance between the two buoys being 735 yards, or $\frac{3}{8}$ of a mile. The channel here is easily navigable for ships drawing 25 feet of water; its breadth at Craney Island, 250 yards, and at buoy 9, a mile and an eighth south, is 400 yards, broadening as it extends.

Below Craney Island Light, as the river Elizabeth flows, the channel stretches three miles and a half in a straight course, due north, into Hampton Roads, opposite Sewall's Point. There is no obstruction to the view over the entire length of the channel between Sewall's and Lambert's Points, except by such vessels as may happen to be lying near or passing along the channel.

On the western side of the channel, south of Craney Island as far as buoy 9, very spacious waters expand to the shore, which are navigable for a distance of twice the width of the channel for vessels of 8 or 9 feet draft.

East of buoy 9 there is a wide space of water extending half a mile to land, but it has no navigable depth. It is deceptive, however; and owing to the eastward bend of the channel around buoy 9 to Lambert's Pier, navigators coming up from Craney Island are apt to head directly for Lambert's Point Light, thinking they are in mid-channel, when, in fact, they are more or less east of mid-channel, and are unintentionally violating a cardinal rule of navigation, which enjoins them to keep on the spacious waters west of mid-channel.

It was in the channel and waters thus described that the collision which has been mentioned occurred. Each ship had on board, as required by law, a licensed pilot, taken up at the Virginia Capes. The *Victory* was coming into Norfolk in ballast. The *Plymothian*, having come in for coal, was going out on her voyage to Liverpool.

Just as the *Plymothian*, having left Lambert's Pier, had

rounded buoy 9, and had straightened out on her course down the channel, the *Victory*, in coming up from Hampton Roads, had got just abreast of Craney Island Light. It was at about 4 P. M. that the two ships were thus in motion, and began to approach each other at a distance apart, at the start, of a mile and an eighth.

The *Victory* had been moving at the rate of ten miles an hour; but at Craney Island she slackened her speed and proceeded up the channel at the rate of six or seven miles an hour, with a two-mile flood tide assisting her.

The *Plymothian*, on straightening out at buoy 9, had begun to move against the tide at the rate of about four miles an hour. The *Plymothian* moved on a ported helm and kept well to the east side of the channel. The *Victory*, which, at Craney Island Light, was at mid-channel according to most of the evidence, but on the eastern side, according to her own testimony, moved, after or from the time of passing Craney Island Light, on or to the eastern side of the channel, under a starboard helm. Each vessel moved so long on these courses under the helms respectively mentioned that when the collision which was threatened became imminent, and each reversed engines and backed with all speed, they did so ineffectually. The *Plymothian's* headway was checked, but she had little backward movement, if any, at the time of collision. The *Victory's* headway was not stayed, and she was still moving forward at the moment of collision. The stem of the *Victory*, at 4.14 P. M., came into the port side of the *Plymothian* at her main bridge, inflicting so deep a wound that she immediately beached on the bank of the channel east of buoy 7.

Shortly before sounding three whistles and reversing her engines the *Victory* had a schooner close under her starboard side, which prevented her from porting her helm. She had previously met two other schooners on her starboard side. All three of these schooners were on the east of mid-channel, bound out to Hampton Roads.

It would seem to be useless to consider how either vessel had moved before the time when, one of them being at Craney Island Light and the other off buoy 9, they began at the hour of 4 P. M. to approach each other in the

open channel. But it may as well be premised that the *Plymothian* had not before then, in coming out from Lambert's Pier, gone over to the west of the channel near to red buoy 22; and had not, after doing so, re-crossed the channel to reach its position near buoy 9, as claimed by the *Victory's* counsel. The tide was not strong enough to force her over there, and it would have been out of her course to have gone there. The testimony is conclusive to that effect. Nor was the west side of the channel, as seen that afternoon from Craney Island Light to red buoy 22, lined with numerous vessels at anchor to a degree obstructing that side of the channel, as claimed by the same counsel. There were barges and other craft anchored near the red buoy, but not as many as usual. The weight of testimony is, that the western part of the channel, so far, at least, as abreast of buoy 7, was free from obstruction. The *Victory's* own witnesses place such schooners as that steamer met after passing Craney Island, east of mid-channel, in positions not only suggesting to her to take the western side, but forbidding her, under the rule, to take the eastern side. Moreover, the claim of the *Victory's* crew, that each of three steamers which she met in coming from Hampton Roads up Elizabeth River gave her two whistles and forced her over to the eastern side of the channel, is contradicted flatly by the officers of two of those steamers and by all the witnesses in the case who testified that when she had reached Craney Island she was in mid-channel. The preponderance of testimony in favor of her being in this last-named position is so great as to be conclusive of the fact. The only steamer whose crew was not examined on this point was a foreign tramp, and her testimony could not be obtained. But that vessel was met in Hampton Roads, three miles from where the next steamer was met, and there was space and time abundant for the *Victory* to pass to the proper side of the channel after meeting the tramp. Even if the two other steamers had passed on her starboard side, which they deny they did, their distance apart was ample for allowing the *Victory* to pass between them to the western side of the channel if she had desired to do so. Nor, indeed, did the *Victory* (if in fact she had been pressed by the three steamers

to the eastern side of the channel, and was held there when she Craney Island by a sort of marine duress), at any time after sighting the *Plymothian*, give her alarm signals or any sort of notice that she was on the east side of the channel by a compulsion which she could not throw off.

I consider it proved beyond reasonable doubt, that the *Victory* and *Plymothian*, at 4 P. M., on the afternoon under consideration, one of them in mid-channel abreast of Craney Island Light, and the other in mid-channel abreast of buoy 9, were free to proceed according to the rules of navigation governing them on the occasion, on their respective courses, without obstruction, or let or hindrance of any kind.

Much evidence was taken pro and con on each side, upon the question of the seaworthiness of the whistles of the two steamers. The result of the elaborate testimony taken on this question is to show that the whistles of both steamers were as good as those of English steamers usually are, and were in good working order.

After rounding buoy 9, and straightening out on her course down the channel, the *Plymothian* gave a long whistle, indicating that she would pass the *Victory* port to port. It was some time before the *Victory* answered; which she at length did with a cross signal of two whistles.

Nelson, her pilot, says, supported by a heavy preponderance of testimony, that she did not respond until she was half way between Craney Island Light and buoy 7. The *Plymothian* thereupon blew one signal whistle a second time, and was then promptly answered by a cross signal of two whistles by the *Victory*. The two steamers thereupon, and at the same time, blew alarm signals and at once backed their engines at full speed; and this backing of engines continued until the collision occurred.

The headway of the *Plymothian* was overcome, and it is possible she attained a slight backward movement. The headway of the *Victory* was not overcome, and she ran into the *Plymothian's* broadside with such force as to drive fifteen inches into her side and to render immediate

beaching necessary. She penetrated fifteen inches into the *Plymothian*, notwithstanding the fact that the angle of incidence with that ship was sixty or seventy degrees.

Opinion.

HUGHES, *J.*: It is obvious, from the foregoing statement, that the question in the case under consideration is, whether or not it is governed by the great rule of the road: "Keep to the right." That rule is embodied, as Article 21, in the Revised International Rules and Regulations for Preventing Collisions at Sea, adopted and made the law of the United States by the Act of Congress of March 3, 1885, 23 Statutes at Large, 438 *et seq.* The act declares that they shall constitute the rules for the navigation of vessels "upon the high seas and in all coast waters of the United States, except such as are otherwise provided for." The exceptions alluded to are defined by the act itself, in the section declaring, that "nothing in these rules shall *interfere with the operation of a special rule*, duly made by local authority, relative to the navigation of any harbor, river, or inland navigation." The *rule* only is excepted, not the coast water itself.

The act of Congress prescribing these rules is a *law*, of which all the world must take cognizance. Special rules of local ordination are not laws, but rules only; and, in order to be binding, must be brought home to the knowledge of navigators, and proved affirmatively in the courts. I know, however, of no provision of such local rules, so far as they affect our Eastern waters navigable from the ocean, which conflicts with the International rules adopted by Congress, and prevailing, by general adoption, the world over.

Those general rules of the world at large, adopted and made laws of the United States by Congress, are in force in the oceans and seas off our coasts, and in all the coast waters of the country, that is to say, in the rivers, bays and roadsteads opening into the ocean, and "allied to ocean navigation from being used and necessarily used by all ocean bound vessels," and vessels coming in from the

outer waters. These rules would be paralyzed if they ceased to operate in favor of ocean ships as soon as they passed within lines drawn between points of land projecting into the ocean. That they are intended to be in force and operation within such lines is proved by their very terms. Article 21, which has been mentioned, would be a meaningless nullity under a contrary contention. Its language is: "In narrow channels every steamer shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard of such ship."

Except in the instances of two or three great straits in different parts of the world, so few in number and each so wide that no rule is necessary in regard to them, no such narrow channels as Article 21 contemplates are to be found beyond lines drawn between the great *fauces terræ* of our seaboard. The contention that this important article applies only to the outer seas would exclude Chesapeake Bay, Hampton Roads and Elizabeth River from the category of "coast waters." That bay has been called the Mediterranean of America from the vast and varied commerce that floats upon it carried largely in ships of the ocean.

Hampton Roads, from the depth of its waters, its spacious area and its land locked conditions of safety is a favorite resort in storms for all vessels that navigate our Atlantic seaboard. Elizabeth River carries a channel of 25 feet in depth and from 250 to 500 yards in width all the way from Hampton Roads to the National Navy Yard at Gosport. It would be imposing hard lines upon foreign steamers and sailing ships coming up to Norfolk with and for heavy cargoes, for the Courts to repeal Article 21 as to a river traversed so constantly by sea-going ships of the largest size and capacity as the Elizabeth River is—an article known to all navigators from every part of the earth—and to dwarf the river into a local harbor, subject to the provincial domination of a town council, and to the crude regulations of ever changing town officials.

It may not be practicable to define with precision the meaning of the phrase "coast ocean waters." But so far as this Court is concerned I hold that it embraces all wa-

ters opening directly or indirectly into the ocean and navigible by ships, foreign or domestic, coming in from the ocean, of draught as great as is drawn by the larger ships which traverse the open seas. I hold that all tide waters, navigable from the ocean, with navigable depth for ocean craft, are coast waters in the meaning of Article 21.

The Elizabeth River between Norfolk and Hampton Roads is one of the ocean waters, and the International Rules of Navigation are therefore in full force and operation in that river.

Elizabeth River is not embraced within the meaning of the clause of the Act of Congress, providing that "a special rule duly made by local authority relative to the navigation of any harbor" shall not be *interfered with* by the International Rules of Navigation. If the river is a harbor at all, it is only as a part of the harbor of Norfolk. But it is not within the territorial limits of Norfolk, and is not subject to any municipal regulation in force within that corporation. It is competent for Norfolk to ordain rules of navigation for her own harbor; but these rules lose their authority when the territorial boundaries of the city either on land or water are passed. But even if this were not so, it has not been shown that any rule of navigation ordained by Norfolk for the government of shipping within her own harbor, is in conflict with Article 21, or with any other law of navigation embodied in the International Rules. If so, if there be no municipal rule of navigation in force in Norfolk harbor with which Article 21 or any other International Rule *interferes*, then Norfolk harbor is itself subject to those International Rules, and is in the category of "coast waters" contemplated by the Maritime Act of Congress of March 3, 1885. Those rules are in force in Elizabeth River independently of any rules ordained by Norfolk, and they are in force in Norfolk harbor itself, as long as they shall not *interfere* with any rule of navigation which may be enacted by the local municipality. It is fortunate for Norfolk that this is so; it would be a subject of serious public regret if it were not so.

International Article 21 was the law of the road on the occasion when the *Plymothian*, off buoy 9, and the

Victory abreast of Craney Island Light, one mile and an eighth apart, began at the same time to approach each other along the narrow channel of Elizabeth River between those two points. The *Plymothian* obeyed Article 21; the *Victory* disregarded it. The collision which happened in direct consequence of the *Victory's* disloyalty to the rule, was caused by the *Victory*, and through her fault alone. The fact that she had had a schooner close under her starboard side shortly before the collision, did not excuse, but condemned her. The fact that this and two other schooners were moving on her starboard on the eastern side of the channel, were three additional reasons why she should have come up on the western side from Craney Island. These three insignificant vessels were teaching her a lesson which she rejected.

International Article 15 did not apply in this case. At a distance of a mile apart, these two steamers, in full sight of the channel between them, by clear daylight, were not approaching each other "in such manner as to involve risk of collision."

The liability of the *Victory* for this collision does not depend upon the question whether the statement of facts drawn up by the Court, and prefixed to this opinion, is strictly and in every respect in conformity with the weight of evidence taken in this cause. If there were no other evidence in the record but that given by the master and crew of the *Victory*, that ship would be shown to be liable. She had no right, seeing the *Plymothian* coming up the narrow channel, to persist in running on the eastern side of it.

The thoroughly disproved testimony given by her master and the deck witnesses of her crew, intended to show that she was driven to the extreme eastern side of the channel by other steamers and by sailing vessels, has no other value in the case than to show that these witnesses felt the pinch of Article 21, and made desperate efforts to excuse the obstinate and fatuous perseverance of her navigators in keeping on the eastern, and to them as they well knew, the contraband side of the channel. The *Victory* is liable for the collision; and I will decree in all respects to that effect.

It remains for me to deal with a few of the special aspects of the case. On the question of lookouts, I have been always exacting; and I think both steamers were at fault in not having had each a special lookout on duty. But in neither case does it appear that the absence of such a lookout contributed to this collision. Each ship was navigated by a licensed pilot, with her master at his side on the main bridge acting as lookout. It was in the daytime, and the way was as visible to the officers on the bridge as it could have been to a lookout at the stem. The master and pilot were in each case intent upon the duty in hand, and their orders to the helmsman and to the engine-room would hardly have differed from those actually given, if a lookout had been calling out to them what they both clearly saw and knew.

But it is only with reference to the *Plymothian* that the question of lookout is of any importance. The contention of counsel for the cargo, that the absence of a lookout on that steamer contributed to the collision, is not supported by the evidence in the case. Inasmuch as this evidence shows that the officers on the bridge did not hear the first cross-signals of the *Victory*, this counsel contends that if there had been a lookout forward, and the pilot, Henley, and the master, Mardon, had been notified of this cross-signal, there would have been time for the *Plymothian* by hard starboarding to have passed the *Victory* on her starboard side. But the proof is, that the *Victory* blew her first cross signal of two whistles as far off as half way between buoy 7 and Craney Island Light, or more than a thousand yards from the *Plymothian*, before any stress of circumstances arose to require of her a violation of the rule of navigation, which she was faithfully adhering to. It was not competent for the *Victory*, at that distance, to require from the *Plymothian* a violation of Article 21, unless there was some cause forcing her to do so. That there was no such cause is shown by the evidence, and was virtually confessed by the *Victory* herself when she failed to follow up her cross-signal by additional three sharp alarm whistles giving notice of such a cause. Failing in this, the *Plymothian* was not, at a distance of a thousand yards, and running against a

flood tide at the rate of only four miles, either under obligation or at liberty to disregard a cardinal rule of navigation at the mere cross-signal of the *Victory*. She would not and should not have done so, even if a lookout, properly posted in her bows, had notified her navigators of the cross-signal. Her officers on the bridge would and should have pursued precisely the course, if they had known of the first cross-signal, which they did pursue on not hearing it; and the absence of a lookout contributed naught towards the collision. I, therefore, consider that the contention of the counsel for the cargo on this point must be overruled.

Although it is wholly unnecessary in this decision to do so, I will notice some references of counsel for the *Victory* to the decision of this Court in the case of the *Lawrence — New York*, rendered in August, 1892, and affirmed on appeal by the United States Circuit Court of Appeals for the Fourth Circuit, at its February Term, 1893.

Counsel for the *Victory* contends that in that case this Court held that a steamer coming up in the channel of Elizabeth River from Craney Island to Norfolk was at liberty to take either the western or eastern side of the channel at pleasure. The decision was a very different one, and was rendered in a case having no relation to the question involved in the present litigation. In that case the steamer *New York*, plying twice a day between Norfolk and Cape Charles City, had, in a foggy morning, while moving at an unlawful speed in a fog, run into the barge *Lawrence*, which was a very large vessel loaded with coal, and lying at anchor on the western side of the channel of Elizabeth River, half way between buoy 7 and Craney Island Light. It was shown in evidence that the channel where the *Lawrence* lay was 450 yards wide; that the *Lawrence* was anchored on its western side as near to the bank as could be to allow of her swinging clear of it, and that at least half of the 225 yards west of mid channel was clear. The *Lawrence* was swinging when run into due north on an ebb tide, and was not only on the western side of mid-channel, but was well off on the western side of that 225

yards of western channel? The steamer *New York* came down from Craney Island close upon the western side of the channel in a thick fog and struck the *Lawrence* on her starboard quarter, although there was abundant room between the *Lawrence* and mid-channel for the *New York* to pass to the port or east side of her. Nothing is said in the opinion of the Court to indicate that the *New York*, in passing on the port side of the *Lawrence* would have passed to the east of mid-channel. Between the *Lawrence* and mid-channel there was clear space of more than a hundred yards; and the water east of mid-channel was not in the case at all. The evidence showed that there was not room between the *Lawrence* and the western bank of the channel for the *New York* to pass, and the Court held that the *New York* was in fault in not passing on the eastern side of the barge where there was abundant room. The Court used the following language in its decision:

"All the testimony shows, and the pleadings admit, that they (meaning the *Lawrence* and a companion barge that was lashed to her port side), were then on the western side of the channel. The evidence shows, moreover, that the *New York* struck, from the west, the barge which was the western one of the two. Certainly there was room in a channel, half of it as wide as 225 yards, for a steamer to pass vessels lying in the other half of the channel which was another 225 yards in width."

That case has, therefore, no analogy with the one at bar. Equally erroneous is the contention of counsel for the *Victory*, that in that same case of the *Lawrence-New York*, this Court held that the Elizabeth River, north of buoy 9, was a part of the harbor of Norfolk, and subject to her jurisdiction in respect to a Harbor Master. The facts were, that by a stretch of authority, growing out of a public necessity, Norfolk had appointed a nominal harbor master at Lambert's Point, who assumed and exercised the authority of designating places of anchorage for the great number of vessels constantly coming in there for the Pocahontas coal. This harbor master, so called, had for some time been in the habit of anchoring these vessels

on the western side of the channel near to red buoy 22 and up and down on that side as far as necessity required. He so acted by general sufferance and from public necessity and not by conceded authority. This *quasi* official action of his was known to all the masters of steamers which navigated the channel, all of whom acquiesced in and none of whom resisted his authority. Contrary to this self-adopted rule of acquiescence, the master of the *New York*, in the suit of the *Lawrence*, among other things, contended that the *Lawrence*, when she was struck by the *New York*, was unlawfully where she was, and that she had been illegally anchored there by a person who was not a harbor master in the eye of the law.

This Court held that she had a right to be where she was when she was struck by the *New York*. Its language was as follows:

"In a technical point of view, the authority exercised (by the acting harbor master) is probably questionable. But the public interests required that there should be some authority to control and regulate the anchoring of those loaded vessels; and until the law provides some other means of regulating this important business, custom and general acquiescence must be held competent temporarily to supply the omission of the law. These barges were passive in the matter of being placed in the anchorage in which they lay. They had not gone there of their own volition, in a spirit of caprice and indifference to consequences. The presumption is that, objectionable as the practice is of placing vessels along that channel in such numbers as the evidence shows, yet the placing of these particular barges was as judicious as the evil practice admitted of, and I do not feel that it would be competent or just for this Court to undertake a reform of this evil by imposing penalties. The reform needed is a subject for municipal legislation, and it is hardly admissible for the Court to assume the role of legislation by means of penal decrees and judgments."

There is nothing in this decision that gives countenance to the proposition that the channel of Elizabeth River between Lambert's Point and Craney Island is part of the

harbor of Norfolk, subject to her jurisdiction, and excepted from the operation of Article 21 of the International Rules of Navigation.

As to the question whether the clause contained in the bills of lading of many British ships and sanctioned by British law, exempting the ship from liability for damages to her cargo, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariner or other servants of the shipowner, and some of them containing a clause providing that the contract shall be governed by the laws of the flag of the vessel carrying the goods, it has been settled in this country that such clauses are contrary to public policy and therefore null. I should feel constrained to rule accordingly, if the question could rise in the case at bar.

Opinion of the Circuit Court of Appeals.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOURTH CIRCUIT.

No. 113.

THE CANTON INSURANCE COMPANY, LIMITED, *et al.*, Appellants, VERSUS Claimants of Steamship "VICTORY" and Claimants of Steamship "PLYMOTHIAN," Appellees, AND Claimants of Steamship "VICTORY," Appellants, VERSUS THE CANTON INSURANCE COMPANY, LIMITED, and Claimants of Steamship "PLYMOTHIAN," Appellees.	Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

(Argued February 11, 1895. Decided May , 1895.)

Before FULLER, Chief Justice, and GOFF and SIMONTON, Circuit Judges.

Argued by Mr. WILHELMUS MYNDERSE, of BUTLER, STILLMAN & HUBBARD, for Canton Insurance Company; ROBERT M. HUGHES, of SHARP & HUGHES, for the S. S. *Victory;* FLOYD HUGHES, of WHITEHURST & HUGHES, for S. S. *Plymothian.*

These are appeals from the District Court of the United States for the Eastern District of Virginia, sitting in admiralty.

On the 12th November, 1891, the British steamer *Victory*, in ballast, was proceeding up Elizabeth River on her way from Hampton Roads to Norfolk. The steamship *Plymothian*, on the same day, had left the pier at Lambert's Point and was proceeding to sea down Elizabeth River. She had a cargo of cotton. The *Victory* was an iron steamship, 338 feet in length, 38½ in breadth, drawing 17 feet aft and 13 feet forward. In officers and crew she had thirty-one men. The *Plymothian* was 216 feet long, 1,016 net tonnage, her cargo of 3,682 bales of cotton. Her officers and crew numbered twenty-one. Each ship was in charge of a local pilot. The master of each steamship was on the bridge with the pilot acting as lookout, and seeing that the pilot's orders were executed. Neither of the steamships had any other lookout. The channel from the pier at Lambert's Point runs to the channel of Elizabeth River at an angle of about 45 degrees. At black buoy No. 9 in Elizabeth River, the channel of the river becomes nearly, if not entirely, straight, and runs due north from that buoy on a line to and beyond Craney Island light, the distance between the buoy and the light being one and one-eighth of a mile. The uniform depth of the channel between these two points is 25 feet. At Craney Island the channel is 250 yards in width; at buoy No. 9 the channel is 400 yards in width; outside of the channel on both sides thereof there are large spaces of water, that to the west side being 8 or 10 feet in depth, and on the east side of the channel more shallow.

The *Plymothian*, coming from Lambert's Point, had reached the angle of the channel at buoy No. 9, and straightening out again proceeded to sea under a ported helm, keeping to the starboard side of the channel; this was at 4 P. M. At the same time the *Victory* was seen in the channel of the same river opposite to Craney Island light, a mile and one-eighth off, under a starboard helm; she was about mid channel, or perhaps to the eastward of mid-channel, and moving with the tide about 6 or 7 miles an hour.

The *Plymothian* was steaming against the tide at the rate of 4 miles an hour. They kept their respective courses without change until collision became imminent,

indeed inevitable, when each reversed engines and backed with all speed, but without avail. At 4.14 P. M. the stem of the *Victory* penetrated the port side of the *Plymothian* at her main bridge, inflicting so deep a wound that she had to be beached on the bank of the channel east of buoy No. 7. The owners of each of the steamships instituted proceedings seeking limitation of liability. The *Victory* has been appraised at $67,500. She claims to have sustained injury from the collision to the amount of $14,000. The *Plymothian* has been appraised at $33,000. Her freight is valued at $11,871, in all, $45,000 and upwards. The actual amount reduced by her proportionate amount of salvage expenses is $40,000. She claims damages arising from the collision to the amount of $42,000. The damage to the cargo is proved to be $72,000. Each steamship intervenes in the proceedings of the other and claims damages for the collision. The owners of the cargo intervene in both proceedings, seeking to hold both vessels responsible. The District Court held the *Victory* to be solely in fault, and rendered a decree against her, apportioning the sum for which stipulation was given for her *pro rata* between the *Plymothian* and her cargo. Each party comes up to this Court on appeal.

SIMONTON, Circuit Judge:

The experienced and learned Judge who heard the case below, after a clear and full statement of the facts, held the *Victory* liable for the collision, because she violated the great rule of the road, "keep to the right." He applied to her that rule as embodied in Article 21 in the Revised International Rules and Regulations for Preventing Collisions at Sea, adopted and made the law of the United States by an act of Congress March 3, 1895, 23d Statutes at Large, page 238.

The *Victory* being in a comparatively narrow but deep channel, up which she was proceeding in full view of the *Plymothian* coming down the same channel, and on the east side thereof, continued her course without change, notwithstanding the failure of the *Plymothian* to respond to her signals, thus making a collision inevitable. Article

21 is in these words: "In narrow channels every steamship shall, when safe and practicable, keep to that side of the fair way or mid channel which lies on the starboard side of such ship." The proctor of the *Victory* contends that this rule does not apply to the navigation of Elizabeth River, as it is not included in the term "upon the high seas or coast waters of the United States." But in the case of the *Britannia*, 153 U. S., page 130, the Supreme Court of the United States held this Rule 21 binding upon vessels in the harbor of New York at the entrance of East River, and in the *John Knox*, 1 C. C. A. Reports, page 323, the Circuit Court of Appeals of the Second Circuit reached the same conclusion, notwithstanding that the Rule 23d of the Navigation Act appeared to be in conflict with the rule of the supervising inspectors in regard to navigation in New York harbor.

The Rules of Navigation in the Act of 1895 control all vessels on the high seas and coast waters of the United States. The cases above quoted evidently construe these words "coast waters" to mean harbors and other waters upon the coast communicating directly with the ocean. We would be led to the same conclusion, comparing the language used in the Act of 19th August, 1890, 26 Statutes at Large, 320. This act has not yet gone into effect, but it is in *pari materia* with the Act of 1895, and is intended to modify and improve it. It also has an Article 25, containing the exact provisions of this Article 21, and it declares that the regulations must be followed by "all public and private vessels of the United States, upon the high seas and in all waters connected therewith, navigable by sea-going vessels." And it also excludes from its provisions the harbors, lakes and inland waters of the United States. It is not unreasonable, therefore, to construe these words harbors, lakes and inland waters of the United States as meaning the Great Lakes and their harbors and inland waters connected therewith, and to such rivers as flow in the interior of the country at long distances from the sea. But whatever construction we may give to these words, if we conclude that the *Victory* in Elizabeth River was governed not by the regulations of the Act of 1895 but by the regulations theretofore in force, embraced in Sec-

tion 4233 of the Revised Statutes, we will find in those regulations the same rule prescribed which the learned Judge enforced here, "keep to the right."

Not only so, but these regulations in Rule 21 prescribe that every steam vessel, when approaching another vessel so as to involve risk of collision, shall slacken her speed, or if necessary stop and reverse. There can be no doubt that these two vessels were approaching each other, each stubbornly adhering to the same side of the channel, and that their movements involved the risk of collision.

It is contended that the *Victory* in Elizabeth River was under no special regulation requiring her to proceed on that side of the river channel to her right. But if she were not controlled by the regulation of the Act of 1895, or by the regulation set forth in the Revised Statutes, she must have been under some rule established by custom (see *The Vanderbilt*, 6 Wall., 225). The record discloses no custom which authorizes a vessel in this river proceeding down the channel to select either side she pleases.

We are of the opinion that the Court below did not err in the conclusion as to the error committed by the *Victory*. But in considering the right of the owners of the cargo to damages, we cannot reach the same conclusion which he did, exempting the *Plymothian* from all responsibility.

The record shows that the two steamships, at 4 o'clock on a bright afternoon, came into collision in Elizabeth River, a broad and deep stream with ample sea room for each vessel, each having seen the other in full and uninterrupted view when over a mile and an eighth apart. The *Plymothian*, it is true, was on that side of the river where she should be, and the *Victory* was on the wrong side of the channel. Yet, although the steamers were surely approaching each other, it was manifest that each doggedly kept her course without taking any precaution whatever until too late, and when the pending collision became inevitable. The slightest change in the course of each or of either of them would have prevented the collision. It is true that the *Victory* committed a very grave error, and her fault is the greater, but this will not excuse the *Plymothian*.

The rules of navigation leave but little room for mere

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conjecture in controlling the action of the master and pilot. Each of them has in his power the means of ascertaining with approximate certainty the intention and course of the approaching steamer. He must use them.

"Notwithstanding the error committed by one of the two vessels approaching each other from opposite directions, it did not excuse the other from adopting every proper precaution required by the special circumstances of the case to prevent the collision." Rule 24, *Maria Martin*, 12 Wallace, 27; *The Scotia*, 14 Wallace, 181.

"If there be any uncertainty as to the intention of the approaching vessels, this of itself calls for the closest watch and the highest degree of diligence on the part of the other vessel in reference to her movements. It behooves those in charge to be prompt in availing themselves of every resource to avoid not only collision, but the risk of such a catastrophe." *The Louise*, 3 C. C. A., 330.

As was said by Brett, M. R., *The Beryl*, 9th Prob. Div., 137: "The basis of the regulations for preventing collisions at sea is for their instruction to those in charge of ships as to their conduct, and the Legislature has not thought it enough to say, we have given you rules which will prevent a collision; they have gone further, and said, for the safety of navigation we will give you rules which will prevent risk of collision. It is not enough if you do only that which will prevent collision; we will give you rules which will regulate your conduct for the purpose of preventing even the risk of collision. The words are not, if two ships are crossing with the risk of collision, but are crossing so as to involve risk of collision." *The Eleanor*, 17 Blatch., 88.

We cannot find anything in this record which shows any precaution taken by the *Plymothian* when she saw the *Victory* disregarding her signals and obstinately pursuing her course. The only thing which she did was simply to repeat the disregarded signals. Even that was not done until it became too late to avoid collision. Under these circumstances it is impossible to say that the *Plymothian* is free from fault. It certainly would not be equitable to allow her to go in and share on equal terms

in the fund in this Court with the cargo, which certainly was in no fault whatever.

The rights of the cargo owners differ entirely from those of the two steamships. They in no way shared in the faults committed, and they are entitled to complete indemnity, *restitutio ad integrum*. *The Atlas*, 93 U. S., 302; *The Alabama and Game Cock*, 92 U. S., 695; *The Virginian Ehrman and The Agnese*, 97 U. S., 316.

In this instance before the Court, the cargo must be paid for in full by both vessels. This leads to the embarrassing question, "How shall these damages be apportioned between these two vessels? Each of them, as has been seen, was in fault. But the Judge who heard the case, and with his usual care and ability examined and weighed the testimony, came to the conclusion that the *Victory* was grossly in fault, so much so as to be the sole cause of the disaster. Whilst not going to this length with him, this Court fully concurs in his conclusion, that the *Victory* was grossly in fault. The *Plymothian* was guilty of an act of omission. The course of the *Victory* seems almost willful. The *Victory*, no doubt, was the *prima facie* cause of the disaster. If the *Plymothian* had taken the precautions which she should have taken, the disaster might have been prevented. Under these circumstances it would seem to be manifestly inequitable to assess upon her one-half of the entire loss.

The loss to the cargo was	$71,000
The damage to the *Plymothian*	33,000
The damage to the *Victory*	14,000
	$118,000
Of which one-half is	59,000
The value of the *Plymothian* is	40,000

The rule unquestionably is, that when both vessels are in fault both must contribute to make good the damages (*The Washington and the Gregory*, 9 Wall., 513; *The Connecticut*, 103 U. S., 710; *The Potomac*, 105 U. S., 630). And the general rule, almost universal, is to divide the

loss equally among the guilty parties, with this qualification: that if one party is exhausted before the person injured is fully indemnified, the deficiency must be made up by the other party (*The North Star*, 106 *U. S.*, 17; *The Max Morris*, 137 U. S., 1; *The Washington and the Gregory*, 9 Wall., *supra*. *The Alabama and the Game Cock*, 2 Otto., *supra*). But this rule cannot be said to be inflexible. In *The Max Morris*, 137 U. S., 1, the question was suggested before the Supreme Court, but it was not necessary to pass upon it. The Court says: "Whether in a case like this (mutual fault) the decree should be exactly one-half of the damages sustained, or might, in the discretion of the Court, be for a greater or less proportion of such damages, is a question not presented for our determination on this record, and we express no opinion on it.

The application of an equal division of damages is said to be the *rusticum jus*. Chancellor Kent applies to it that term (3 Kent Comm., Section 231; Marsden on Collision, 2d Ed., page 133). That is to say, it is an application of that sense of fair dealing and of justice imbedded in our nature, the conclusions of common sense, of a mind "*abnormis sapiens*." If the spirit of the rule be adopted, and the liability of each vessel be measured by its degree of fault, exact justice will be done by applying the stipulated value of the *Victory* to the loss sustained by the cargo, and by requiring the *Plymothian* to make up any deficiency, so that the cargo owners obtain complete indemnity.